IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY 22/3

M.1658/82

No Special Consideration

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BETWEEN ELLIOT

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing : 8th March 1983

Counsel : M. Harte for Appellant
Miss T. Spain for Respondent

Judgment : 8th March 1983

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(ORAL) JUDGMENT OF BARKER J

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This is an appeal against the conviction of the appellant in the District Court at Auckland on 25th November 1982 on a charge brought under Section 58C(1) of the Transport Act 1962. The appellant had pleaded not guilty to refusing to permit a specimen of blood to be taken under Section 58B of the Act, having been requested by a medical practitioner to do so.

The evidence showed that, on 24th September 1982, the appellant's vehicle was observed by a traffic officer on the southern motorway near Mt Wellington, travelling erratically; it was stopped by the traffic officer who detected the smell of alcohol on the appellant's breath. The appellant admitted consuming a small quantity of drink throughout the evening. The traffic officer had "good cause to suspect" an offence against the drink/driving laws; he administered a breath screening test which was positive. He then requested the appellant to accompany him, in terms of the Act, to a place where a blood test or an evidential breath test could be taken. He agreed to do so.

The traffic officer then transported the appellant to the Ministry of Transport office at Mt Roskill where an evidential breath test was taken which showed a reading of 500 microgrammes of alcohol per litre of breath.

The appellant was duly advised of his rights; he was requested by the traffic officer to supply him with a sample of blood. A medical practitioner was introduced to the appellant. He was told by the traffic officer that this person was a doctor and that a blood sample was requested. The appellant procrastinated for about 30 or 35 minutes, during which time the traffic officer tried to impress upon the appellant the advantage of giving a blood sample.

Although the appellant did not give evidence, it appeared from cross-examination that the medical practitioner concerned was dressed somewhat casually. The medical practitioner admitted he was wearing a pair of "rather battered" blue shorts and jandals. The medical practitioner was called; he stated that he had asked the appellant whether he had given permission for a blood sample to be taken and whether he was perfectly happy for him (the registered medical practitioner) to take a blood sample. The appellant said to him that he was unwilling to allow a blood sample to be taken unless he, the doctor, could prove he was a registered medical practitioner. The doctor told the appellant that he was fully registered and was working as a Registrar at the Auckland Public Hospital; he told him he could not prove that fact, but that the appellant's best defence to any blood/alcohol charge would be if the sample had not been taken by a registered medical practitioner. He asked the appellant rather flippantly, to use his words, "if he could prove that he was a contractor" to highlight the difficulty.

The doctor said he could not remember how far he went with the procedure for taking blood. He thinks he had the arm

band or tourniquet around the appellant's arm and that he proceeded some way along the process. He stated that he was called out on a fairly regular basis to take samples of blood; he had been doing this since May 1981, averaging about 3 per week. On the night in question, he had taken 14 samples.

Mr Harte made submissions to the District Court Judge, unfortunately not recorded in the transcript, to the effect that there was no evidence before the Court that the appellant had been asked to supply a specimen of venous blood in accordance with normal medical procedures. Evidence was that the appellant was only asked to supply a sample of blood to a registered medical practitioner. Although the District Court Judge does not appear to have dealt with these submissions in his judgment, there was, in my view, ample uncontested evidence from which the District Court Judge could infer, in the absence of any suggestion to the contrary, that normal medical procedures would have been used.

The District Court Judge found in his judgment that all the necessary formalities relating to the appellant's apprehension, breath screening test, and evidential breath test were carried out. He noted that the traffic officer had confirmed that the appellant was co-operative and amiable up until the time of the request for blood and that his amiability returned after he had been arrested.

The learned District Court Judge accepted that the medical practitioner's appearance was generally "fairly rough"; he had washed his hands before going to the office and he had processed 14 blood tests on that particular evening. He rejected the appellant's submission that he was not happy with the condition which prevailed when the request for blood was given; after hearing the traffic Sergeant and the doctor, he was, in my view, quite entitled to reject the submission.

The District Court Judge interpreted the appellant's failure to co-operate as just that. He accepted that the appellant had been warned sufficiently; he did not accept that the conditions prevailing were sufficient justification to allow the appellant to refuse the blood sample.

The requirement to advise the suspect that he is required to give a blood sample is found in Section 58B(1)(b) which reads as follows:

> "58B. Blood test - (1) If - .....
>
> (b) It appears to an enforcement officer that an evidential breath test undergone by a person pursuant to section 58A of this Act is not positive but does indicate that the proportion of alcohol in the person's breath exceeds 300 micrograms of alcohol per litre of breath - .....
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> an enforcement officer may require the person to permit a registered medical practitioner to take a blood specimen from him, and that person shall permit a registered medical practitioner to take a blood specimen from him forthwith after being requested so to permit by the registered medical practitioner."

Section 58B(1) in its present form was brought into force in the 1978 (No. 3) Amendment which also enacted an interpretation section 57A wherein "blood test" is defined as "the taking of a blood specimen for analysis". "Blood specimen" is there defined as "a specimen of venous blood taken in accordance with normal medical procedures". This interpretation applies to all the relevant sections of the Act, including Section 58B.

I consider that Section 58B(1)(b) must be read in the light of the definition section 57A; therefore, when Section 58B(1) speaks of an "enforcement officer requiring a person to permit a registered medical practitioner to take a blood specimen from him", that means that he must require the suspect to permit a

registered medical practitioner to take a specimen of venous blood, taken in accordance with normal medical procedures.

The effect of the section is therefore, in my view, the same as it was at the time of the Court of Appeal decision in Ministry of Transport v. Murdoch (Judgment 9th March 1978) when Section 58B(1) read as follows:

> "... a constable or traffic officer may require that person to permit a registered medical practitioner to take for the purpose of analysis a specimen of that person's venous blood in accordance with normal medical procedures, and that person shall permit a specimen of blood to be so taken from him forthwith at the request of a registered medical practitioner."

Despite Miss Spain's submission that the 1978 (No. 3) Amendment Act was passed in the light of the Murdoch decision, the new form of the relevant provision seems to me merely a drafting exercise which introduces a certain felicity into the draftsmanship of a section of an area of legislation not normally notable for felicitous enunciation; the effect of the section is the same as that considered in the Murdoch case.

I consider the decision of the District Court Judge to convict the appellant was correct in the light of the Murdoch case. There, blood had actually been taken but there was a finding by the Judge that there had been no reference to the word "venous" when the respondent's agreement to provide a specimen of blood was sought.

Richardson, J. considered the then Section 58(1) in these words:

> "The section does not specify how the requirement in this respect is to be conveyed to the person from whom the sample is sought. It is not necessary that the exact words of the section be used. It is both necessary and sufficient that

> the essential features of the requirement be made clear to the person concerned by the traffic officer. That information may be conveyed to the person concerned in any way. An almost infinite variety of situations may arise. It is not helpful to speculate on all the various possibilities. It is sufficient to say that, in some cases where this point becomes an issue, it may be necessary to consider what was said and done by the traffic officer, the driver concerned, and perhaps others present, for example the medical practitioner, in the period up to and including the taking of the sample, that is, in cases where a sample is taken. What is essential is that it should be made known to the subject what the traffic officer, as the person in authority, is requiring him to submit to. The effect of what was said and done must be such as to lead to the conclusion that the subject must have known what was involved. His own conduct may, of course, have shed light on his understanding of what was required of him. In this respect I put to one side cases where the officer honestly believed that the subject understood the terms of the requirement, but due to his condition the subject did not comprehend the position (R v. Nicholls (1972) 1 WLR 502)."

Mr Harte submitted that this was one of those cases which Richardson, J. had in mind and that the Court was required to consider what was said and done by the traffic officer, the suspect and the medical practitioner up to and including the taking of the sample or the proposed taking of the sample. And that, therefore, the attitude of the appellant in refusing to allow a person whom he regarded as an unorthodox-looking medical practitioner, and in respect of whom he entertained doubts as to his identity, was a relevant factor in determining whether the appellant had been properly advised that venous blood would be taken from him in accordance with normal medical procedures.

The finding of the District Court Judge that the appellant was unjustified in refusing to allow this medical practitioner, who had been introduced to him as such by an experienced, courteous and efficient traffic officer, to take a blood specimen from him, was clearly open to him on the evidence. As I have already said, the District Court Judge was entitled,

although he does not record it, to infer from the uncontested evidence, that this particular medical practitioner, with his experience in taking blood and who had taken blood on previous occasions that night, would have taken the appellant's blood in accordance with normal medical procedures. There was nothing to indicate otherwise; moreover, the appellant had been assured by the traffic officer that this person with whom he was presented was indeed a medical practitioner.

If there was any deficiency in the information conveyed to the appellant, then the proper course is that taken in the Murdoch case; i.e. to excuse the defect under what is now Section 58E and what was then Section 58(2). Richardson, J. said in Murdoch's case:

> "If the requirement to which consent was given was expressed in too general terms, not being confined to venous blood and with no reference to normal medical procedures, and the sample was then taken as prescribed in the provision, I find it difficult to see prejudice to the subject. I think, too, that the failure to add to the statement that a specimen of blood was required, the qualification that it was limited to venous blood and that normal medical procedures would be followed, could, and should, in these circumstances be excused under s.58(2)."

This was the proper approach to have taken in the present case; indeed, Woodhouse, J. in the Murdoch case, who proceeded on somewhat different lines to Richardson, J., came to a similar view.

He said at p.5 of his judgment:

> "During the argument reference was made to the "reasonable compliance" provision contained in s.58(2). It was submitted that the subsection would be called in aid if it were held that the qualification "venous" would need to be used whenever the requirement for a blood specimen were made. If I had thought it necessary as a

> matter of construction to hold that there must be precise adherence to the formula contained within the relevant part of s.58B(1) I would certainly agree that the present situation would enable use to be made of the reasonable compliance provision of s.58(2). In Coltman v. Ministry of Transport this Court made it clear that the subsection may have application to "any of the provisions of s.58A or s.58B"; and in this part of the case I think the practical insignificance of the word "venous" for virtually all suspect drivers and the mandatory direction to every doctor to act within the statutory formula would go far to support a claim of reasonable compliance in any case such as the present."

A succinct statement of principle which I find applicable to the present case was given by Henry, J. in the case of Sorby v. Police (Judgment 19th July 1972, M.456/72, Auckland Registry); he said in relation to a charge of refusing to give a blood sample:

> "But it should be made clear to the person addressed that he is being required to permit a registered medical practitioner to take a blood sample for analysis. That must be the effect of the words used: A simple request is not enough unless it is so worded that the subject knows that the officer is exercising a power which requires the person addressed to give his permission for a registered medical practitioner to take a sample."

The words "for analysis" should be deleted now from the quote in view of the present legislation. However, this is a succinct statement of principle.

Finally, Mr Harte, in a delayed appeal against sentence, strove to submit that there were "special circumstances" which would have justified the District Court Judge shortening the normal period of mandatory disqualification. These circumstances are said to have arisen from the alleged unorthodox appearance of the doctor and the appellant's state of confusion surrounding his competency. The District Court Judge certainly had these matters in mind; he held that there was a wrong-headed attitude

on the part of the appellant. I am in total agreement; in my view, there is just no possibility of holding that there were special circumstances here.

The appeal therefore is dismissed.

R. D Barker J

SOLICITORS:

T. Hibbitt, Taupo, for Appellant.

Crown Solicitor, Auckland, for Respondent.